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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1678STATE OF CALIFORNIA, ex rel. C. B. CHRISTENSEN, DIRECTOR
OF FOOD AND AGRICULTURE, et al.,*Petitioners,*

vs.

FEDERAL TRADE COMMISSION, et al.,

*Respondents.***Brief of Amici Curiae States of Iowa, Montana,
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Carolina, Tennessee, Wisconsin and Wyoming
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In Support of Petition for Writ of Certiorari**

STATEMENT OF INTEREST OF AMICI CURIAE

According to a press release issued by the Federal Trade
Commission (FTC) on April 27, 1977:

"FTC TO INVESTIGATE STATE MILK PRICE REGULATION

"The Federal Trade Commission has by unanimous
vote begun an investigation to determine whether state
milk price setting laws and related forms of state
economic regulation of milk have any anticompetitive
effect.

"The investigation will focus primarily on state milk laws, rules and regulations that:

- . regulate retail or wholesale prices; and
- . require posting or filing of retail or wholesale prices (price posting laws require wholesalers or retailers to post a schedule of prices at their places of business, and price filing laws require them to file a schedule of prices with the state milk commission).

"Fluid milk is one of the basic foods consumed by the American public. State laws empowering state agencies to set wholesale or retail prices exist in fifteen states in which there were approximately \$3.5 billion of retail milk sales in 1975. Those states are: Alabama, California, Maine, Massachusetts, Montana, Nevada, New Jersey, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Vermont, Virginia and Wyoming. Alabama, California, Massachusetts and North Carolina are the states which do not currently exercise their price-setting authority. In addition, state laws requiring price posting or filing exist in nine states, in which there were approximately \$2.3 billion of retail milk sales in 1975. Those states are: Carolina, Iowa, Kentucky, Mississippi, Nevada, Oklahoma, South Carolina, Tennessee and Wisconsin.

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"On the basis of the information obtained in this formal investigation, the Commission will determine whether or not these various laws, rules and regulations constitute unfair methods of competition in violation of Section 5 of the FTC Act. Should the formal investigation so indicate the Commission may, if necessary, use its authority to promulgate a trade regulation rule preempting such laws."

The states named herein as *amici curiae* regulate wholesale and/or retail prices of milk, and/or require posting or filing of milk prices. According to the above press release,

the FTC is currently investigating whether this regulatory practice of the *amici* states constitutes a violation of the Federal Trade Commission Act (the "FTC Act"), to determine whether a federal regulation should be promulgated that forbids such a practice. In the view of the *amici* States, the FTC lacks jurisdiction to promulgate such a regulation, or otherwise to control the activities of the States. The question whether the FTC has jurisdiction to control the activities of the states is the question raised in the instant case, *State of California, ex rel. C. B. Christensen, Director of Food and Agriculture, et al., v. FTC, et al.* Hence, the *amici* states have an interest in the jurisdictional question raised in that case.

STATEMENT OF THE ISSUES

1. Must a state or its instrumentality exhaust its administrative remedies before the FTC prior to challenging the jurisdiction of the FTC over the state or its instrumentality, where that jurisdictional challenge presents solely a question of statutory interpretation?

2. Is a state or its instrumentality a "person, partnership or corporation" within the meaning of the FTC Act, such as to render the state and its instrumentality subject to the jurisdiction of the FTC?

ARGUMENT

This Case Presents An Important Federal Question That Affects Several States, and That Has Not Been, But Should Be, Resolved By This Court.

The principal question in this case is whether, under the FTC Act, the FTC has jurisdiction to control the activities of a State, California, that provides for promotional sales of milk products. This issue is of vital importance to the *amici* states. The FTC is currently conducting an investigation to

determine whether to adopt a regulation that forbids the *amici* states to regulate the pricing of milk products, on grounds that the regulation of such pricing is violative of the FTC Act. The *amici* states take the position that the FTC has no jurisdiction over the activities of the states. This is the question raised in the instant case. Hence, the resolution of that question is one that will vitally affect several states, and is thus of sufficient importance to merit the attention of this Court.

The federal district court ruled definitively that the FTC has no jurisdiction to control the activity of California officials in conducting a promotional campaign in furtherance of a marketing order created under California law. The appellate court avoided this question by holding that it must be presented initially to the FTC prior to its presentation to the courts. It is difficult to understand the basis of the appellate court's decision. The question in the case is solely one of statutory interpretation, *i.e.* whether the FTC Act authorizes the FTC to control the activities of the states. This is a question over which the FTC has no particular expertise. Moreover, the FTC has already made its decision that the FTC Act vests the FTC with jurisdiction over the states, for that was the basis of its principal argument before the appellate court; hence, nothing can be gained by requiring the FTC to make the same determination in an administrative proceeding. Further, both sides presented ample documentary evidence on the jurisdictional question in support of their respective motions for summary judgment, thus rendering unnecessary a further administrative hearing on this question. Finally, the states, which are essential components of our federal system of government, should not be required to exhaust their administrative remedies to the same extent as private persons, where the

question is one of jurisdiction that depends solely on statutory interpretation.

In *Parker v. Brown*, 317 U.S. 341 (1943), this Court held that the federal antitrust laws, as found in the Sherman Act, are not applicable to the states, since these laws do not specifically refer to the states. As the Court stated, "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351. The state instrumentality in that case was an advisory board created under California law, just as in this case.

In *Cantor v. Detroit Edison Co.*, ____ U.S. ____, 44 U.S.L.W. 5357 (1976), this Court narrowed the effect of the *Parker* decision by ruling that *private* persons may be subject to federal antitrust liability depending upon several factors, *i.e.* whether the activity in question is essential to the success of the state's regulatory scheme and whether the private person has any "freedom of choice" not to comply with the state's regulatory scheme. However, the Court strengthened the effect of the *Parker* decision by indicating that, where the activity in question is that of the state or its instrumentality rather than that of a private person regulated by the state, the federal antitrust laws are not applicable. As the Chief Justice properly recognized in his concurring opinion, the majority opinion focused on the "identity of the parties" rather than on the "challenged activity." *Id.* at 5364. (Emphasis in the original.) Accord, *Bates v. State Bar*, ____ U.S. ____, 45 U.S.L.W. 4895 (1977).

The activity in this case is that of the State of California and its instrumentalities, not that of private persons regulated by the State. The advertising campaign is conducted by the State's Director of Food and Agriculture and an advisory board created under his supervision, not by pri-

vate parties. Hence, under *Parker, Cantor* and *Bates*, the federal antitrust laws, of which the FTC Act is a part, are inapplicable in this case. This result recognizes that, under our constitutional system of government, Congress presumptively does not intend to regulate the trade activities of the states unless it clearly says so, and that federal statutes applicable to private individuals are not applicable to the states in the absence of a clear expression of congressional intent. No such expression is found in the FTC Act.

Given the fact that the FTC is currently investigating the milk pricing activities of several states for the purpose of determining whether to forbid such activities, there is a need to promptly resolve the jurisdictional question posed in the instant case. This need outweighs the importance of having the FTC make its own determination of the jurisdictional question. Indeed, since the FTC has already argued before the appellate court that its jurisdiction extends to the activities of the states, there can be little doubt as to how the FTC will determine that question.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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